THE

Madras Weekly Notes.

1911] Sunday, October 1, 1911 [1911

KARNAM SESHAYYA *v.* EMPEROR:

The decision in the above case [1911] 2 M. W. N. p. 71 is, in our opinion, open to criticism. The facts of the case are that the complainant and his wife were sleeping in their house, with its door open, that they awoke in the dead of night and discovered that some persons were inside the building. Both the lower courts found that the accused must have gone to the house to commit an offence of some nature though neither could make up its mind to say what specific offence. And the point for consideration was if there was any intention in the case such as is necessary under Sec. 446, I. P. C, to constitute criminal trespass. Their Lordships, Ayling and Spencer, JJ., are of opinion that the Courts need only find "that the accused must have entered the house with the intention of committing some offence and this is all that is required." This conclusion, we beg leave to point out, is not in keeping with either the provision of the Code dealing with criminal trespass, or the rulings on which the learned Judges apparently seek to rest it.

As the plain wording of section 441, I. P. C. suggests, an act does not amount to a criminal trespass unless it is done with an intention of committing some offence, or of intimidating, insulting or annoying. In either case, therefore, the existense of a clear intention to do a "thing" or omit the doing of it which is made punishable either under the Code or under any special or local law (S. 40.), is an absolutely necessary ingredient of criminal trespass. And it would also be remembered that in criminal intimidation (S. 503), and in insult (S. 504), the chief element that constitutes the crime is the intent of the offender. One must, therefore, note that the section is so worded as to show that the act must be done with intent and does not, as other sections do, *e.g.*, S. 425, embrace the case of an act done with knowledge of the likelihood of a given consequence. Merely to trespass is not ordinarily an offence: it is the intention that renders the entry criminal. Moreover the principle of inferring intention from knowledge cannot he applied in cases under the Indian Penal Code. For, as pointed out above, the Code draws a distinction between the two mental conditions, both the words occurring in the definition of some offences while in others 'intention' alone entering as an ingredient. Thus it is clear that some criminal intent must be specifically proved and not presumed or inferred. The Courts in this case have not been able to bring home to the accused an intention to commit any particular offence. The Court of

First Instance was of opinion that the intention was to commit neither theft nor adultery but to foist forest produce. The lower Appellate Court agreed with the Court below in rejecting the case of theft and adultery. But it went further and held that the intention to foist forest produce was far-fetched and hence improbable. In spite of this finding it struck the appellate Magistrate that the accused must have gone there to commit some offence or other. If not, he argues, why should he enter the house at all? Now, this is not the intention which the section wants the Court to find. A vague inference that the accused went to commit some offence or other is directly in contravention of the clear words of the section. No doubt, one can understand the position that the Courts need not find the specific intention when the accused is proved to have designed theft and adultery or either. But to hold that it is enough to find an intention to commit some offence, inconceived or inconceivable, is to open a wide and dangerous door to far-fetched inference. As has been well-observed, "The unusually vague and elastic language used in this section if not closely scrutinised and strictly interpreted might lead to its application to sets of facts or circumstances for which it was never intended by the Legislative authorities who framed it. For it is easy enough to conceive multitudinous cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit of the section and which no one would for a moment consider fit subject even for civil proceedings much less for a prosecution in a Criminal Court."

This observation of the learned Judges in 2 All. 465, shows in strong language the danger of the courts doing away with the difference between civil and criminal trespass. It does not at all follow that because an act is unlawful and is one restrained by the civil law or one for which the civil courts would award compensation, it is necessarily criminal. Yet the practical effect of this decision is to demolish that distinction.

Their Lordships' decision is not only against the spirit and letter of the section; but it also fails to derive support from the rulings which have been pressed into service. *R.* v. *Samban* (Weir's Crl. Rulings Vol I. p. 533) only lays down that when from the circumstances of the case a court could reasonably conclude that one of the many "specified offences" must have been intended, then it is unnecessary for the court to go further and decide which of them the accused intended and which not. If in this case the finding were that the accused wanted to commit theft or adultery or an offence under the Forest Act, but not specifically any of them which, then a conviction can rightly be upheld. But if the courts find against all the three alleged offences and does not itself suggest a fourth, but simply infers an intent to commit an unnamed crime can a conviction be based upon such a finding? Apart from this the above decision must be held to have been overruled by the later decisions in *R.* v. *Durgayya*, *R.* v. *Rayapadayachi and In re Venkataramanaya Reddiar*. The decision in *R.* v. *Rayapadayachi* is based on the authority of later rulings of the Madras High Court. Their Lordships observe. "It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result." This proposition has been arrived at after an exami-

nation of the language of the section and was not and could not have been meant to apply to cases of intention to insult annoy or intimidate. In the case of *Sellamuthu* v. *Rollamuthu*, his Lordship Mr. Justice Benson does not dissent from, the above decision, as the learned judges think. His Lordship draws a distinction between a person entering upon another's premises hoping to keep his conduct secret and a person who does the same thing openly, and holds that in the former case the person should be taken to have not intended to cause the result though it might happen, while in the latter case he must be taken to have intended the natural consequences of his action. The Calcutta case referred to by their Lordships does not at all support the position taken up by the learned judges in this case. In that case there was an express finding that "it is clear that they *intended* to". We are therefore, of opinion, that the decision in the present case is not supported by any authority and is opposed to the clear wording of the section. It is to be regretted that it seeks to demolish the distinction between civil and criminal trespass.

THE WEEK'S CASES.

27th September, 1911.

White, C. J. and Ayling, J.

S. A. 870 of 1910.

The widow of a brother of the deceased husband is no heir to the stridhanam properties of a woman.

Sundara Iyer, J. and Phillips, J.

C. M. S. A. 45 of 1910.

Sundara Iyer, J:—When there were two judgment-debtors in a case and one of them by fraud prevented the execution of the decree the decree-holder is not entitled after the lapse of 12 years to take execution against the co-judgment-debtor who was not guilty of fraud. It is only against the judgment-debtor who was guilty of fraud that execution could be ordered after 12 years.

Phillips, J:—When there has been as a fact fraud on the part of any judgment-debtor the decree-holder is entitled to have execution even after the expiry of 12 years as against all the judgment-debtors in the case.

Observations on the question whether evation of warrant would be fraud within the meaning of section 48, C. P. C.

28th September, 1911.

Abdur Rahim, J. and Phillips, J.

S. A. 1499 of 1909.

Abdur Rahim, J.:—The doctrine, *de minimis non curat dex* does not apply in the case of trespass to immovable property. Consequently when the defendant had encroached to the extent of two inches on a land and the plaintiff built a wall thereon, *held* that the plaintiff was entitled to have the encroachment removed and that he was not bound to rest satisfied with damages.

The onus of proof in an appeal that the lower court's decision is wrong is on the appellant and if he does not discharge that onus the decision should be confirmed.

Phillips, J.:—Courts have got a discretion in case of violation of rights of a trivial nature even relating to immoveable property either to grant a mandatory injunction or to award damages instead. In the present case the encroachment being only very slight the award of damages was just and proper.

S. A. 1616 of 1909.

Where the plaintiff, who was a decree-holder in a suit, sued the defendants, who were also decree-holders in another suit

against one of the plaintiff's judgment-debtors and some others, for compensation for illegal attachment and sale by the defendants of some moveable property of the plaintiff's judgment debtors, and the present suit was brought more than one year from the date of attachment but within three years from the date of the distribution of the sale proceeds to the defendants and other rateable decree-holders.

Held (1) That the suit was barred under Article 29 of the Limitation Act.

(2) That the plaintiff's suit was not one under section 295, C. P. C. (Section 73 of the New Code), as the judgment-debtors were not the same in both the previous suits.

S. A. 1461 of 1909.

Plaintiff brought a suit to set aside the mortgage executed by his guardian appointed by Court. The mortgage was made without the sanction of the Court. The consideration for the mortgage was made up of several items of expenditure incurred by the guardian during his minority. The Court of First Instance gave a decree for redemption on payment of such items of expenditure incurred by the guardian as were not barred by limitation at the date of the suit. The Appellate Court admitted the account books maintained by the guardian and came to the conclusion that the Article of Limitation Act applicable to the case was Article 85, Schedule 2 of the Limitation Act and decreed that the plaintiff was entitled to to redeem the property only on payment of the full mortgage amount.

Held by Abdur Rahim, J. :— The Appellate Court had wrongly admitted the additional evidence and even if it was admissible Article 85 was not applicable on the ground that mere items of rent to the guardian entered in the account book does not make the account a mutual, open and current account showing reciprocal payments between the parties.

By Phillips, J :—That the account book was probably admitted by the appellate court the same having been withheld in the first court and that the Article 85 of the Limitation Act applied to the case on the ground that the receipt of rent paid by the guardian created an independent obligation on his part to account to the plaintiff.

Abdur Rahim, J. and Spencer, J.

S. A. 1006 of 1910.

The karnavan of a Malabar tarwad is entitled to take a renewal of a kanom demise in the ordinary course of management if the terms thereof are not shown to be prejudicial to the interest of the tarwad. The fact that he did not consult the Junior members or that all the junior members were for not taking the renewal is no ground for holding that the renewal is not binding on the tarwad.

Under the Malabar compensation for tenants Improvements Act I of 1900 the defendant is entitled to the value of improvements effected by him that exist at the time of eviction even though there is no specific contract to that effect in the document under which he holds possession. The mere fact that in the renewal deed taken by the karnavan there is no specific provision made regarding the payment of the value of improvements at the time of eviction is no ground for holding that the demise is not binding on the tarwad.

Appeal 122 of 1907.

Article 62 of the Limitation Act is ap plicable to cases where one co-parcener after division sues to recover monies omitted in a previous partition suit.

Sundara Iyer, and Phillips, J.

S. A. 272 of 1910.

To sustain an action for improper attachment before Judgment, it is neces sary for the plaintiff to prove that the mesne process was applied for without reasonable and probable cause and there was also malice in fact. Sec. 95, C. P. C. simply provides a special remedy and the section in no way regulates the requisites for an independent action.

Malice does not mean ill-will or hatred. Using the process of Court for indirect purposes will be within the meaning of the term 'malice.' Special damage would be necessary in such an action but the expression must receive a liberal con struction as in certain cases the very pre-sentation of a petition for attachment before Judgment may necessarily involve damage. It is unnecessary to particularise the damage or to make an estimate of the same.

The defendant's status cannot be taken into account in assessing the damages in such cases.

29th, September, 1911.

Sundara Iyer, J. and Phillips, J.

Cr. R. C. 678 to 680 of 1910.

Proceedings under section 107 Criminal Proceedure Code were taken. Before notice was served on the accused the police withdrew the charge sheet stating that they would file a separate charge sheet. The Magistrate then passed an order acquitting the accused.

Held :—The order acquitting the accused is untenable and is no bar to further proceedings.

Meanwhile an order under Section 145 was passed.

Held also that although an order under section 145 was passed it is no bar to proceedings under section 107.

Abdur Rahim, J.

C. R. P. 275 of 1910.

Permission was granted to convert the C. R. P. into a second appeal on payment of deficient court fee.

C. R. P. 316 of 1911.

Where a party defendant was being examined as a witness and was asked to attend on a later date for further examination an undertaking having been taken from him to that effect and he did not attend on the adjourned date the Subordinate Judge struck off his defence. *Held* that he had no jurisdiction to do so and that the only case in which such a thing could be done is prescribed by Order 11, Rule 21.

Spencer, J.

C. R. P. 72 of 1910.

In hearing applications under section 73, Civil Procedure Code by different decree-holders for rateable distribution of monies realized in execution of a decree against a common Judgment-debtor it is open to the Court at the instance of one decree-holder to consider whether another decree holder's decree is a *bona fide* or a colorable one. If the Court finds that any of the decrees are collusive decrees without consideration it is open to the Court to refuse to allow such decree-holder to share in the rateable distribution. The High Court will not interfere in revision under section 115, C. P. C. when the petitioner has a remedy by a fresh suit,

Cr. R. C. 288 of 1911.

The Presidency Magistrate may examine a witness residing in the mofusil, on commission, if his evidece is considered essential under Sec. 503, C. P. C.

C. R. C. 333 of 1911.

Under section 203, the Magistrate may dismiss the complaint, without examining the complainant, as the presentation of a sworn complaint itself is tantamount to the examination of the complainant.

REVIEW.

Commentaries on the Specific Relief Act by R. A. Nelson, M.A., L.L.M. *Publishers: Srinivasa Varadachari & Co., Madras :—*

It needs few words to commend this excellent book to the profession and to the law students. The lucidity and careful analysis characteristic of Mr. Nelson is clearly seen through the commentaries. The author has greatly enlarged the present edition over the previous one by the addition of much useful matter. The commentary is very exhaustive and an almost entirely new chapter on injunctions has been added. Amidst the great pains that the author has devoted to the present edition, he would have done well to have incorporated the decisions from the unofficial Journals as well, seeing the large number that exist and are being cited daily before the Courts.

Civil Procedure and Evidence by Shearwood. *Publishers: Butterworth & Co., London and Calcutta. Price Rs.* 4/8 —

This small work of about 200 pp. is designed for the student in the form of questions and answers. The questions have been selected from the Examination papers on Procedure and Evidence set for the Bar Examination, the Solicitors Final and Intermediate, the University Examination for law degrees and the Civil Service Examination for the last ten years.

The Indian Decisions old series, Vol. I Supreme Court Reports of Bengal. Publishers: The Law Printing House, Madras.

This enterprising firm of publishers are now bringing out the Indian Decisions in 2 series the Old and the New. The old, gives a verbatim reprint of the Supreme Court Reports of Bengal, Madras and Bombay and the Sudder Dewany Adawlat Reports of Bengal, Madras, Bombay and the N. W. P. and all other rare decisions of the High Courts up to 1875. We have now received the first volume of this series and it leads us to reflect that the mantle of the late Mr. Sanjiva Rao has not unworthily fallen upon the shoulders of his nephew Mr. T. A. Venkaswami Rao. The Volume places within easy reach of all students of law the masterly decisions of the good old Judges of the Supreme Court, some of which have now become difficult to get at. We are sure this laudable enterprise will be well appreciated by the profession.

The Court Fees Act by S. N. Ray, B. L. *Publishers : Cranenburgh Law Publishing Press, Calcutta.*

This small book is a commentary on the Court Fees Act by Mr. Surendrath Nath Ray of the Bengal Judicial Serviee, who is already familiar to the profession as a commentator. The introduction traces the history of the Court Fees Act; the commentaries, under the various sections have all been clearly written. The book is a useful handbook of reference.